Supreme Court, U.S.
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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ARMINDO SOARES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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On the Petition:
JUDD BURSTEIN
KIM BONSTROM
MARC FERNICH

8 APP

Questions Presented

1. Whether petitioner's conviction must be reversed because the Trial Court impermissibly barred the jury from drawing any inference from the absence of the government's linchpin cooperating witness?

2. Whether petitioner's conviction must be reversed because the Trial Court precluded him from impeaching the credibility of a nontestifying conconspirator whose inculpatory statements had been admitted through other witnesses?

3. Whether petitioner's conviction must be reversed because blacks and Hispanics were excluded from his jury, in contravention of the Sixth Amendment and this Court's precedents?

List of Parties

Petitioner was initially indicted with Mark Bahna, Glen Schaeffer and William Lombard. After a first trial with Lombard, a superseding indictment issued against petitioner and Lombard. Thereafter, petitioner was retried -- the trial at issue in this petition -- alone.

Table of Contents

Questions Presented i

List of Parties ii

Opinion Below 2

Jurisdiction 2

Constitutional and Statutory Provisions 2

Jurisdiction in the District Court 3

Statement of the Case 3

Reasons for Granting the Petition 4

Conclusion 30

Table of Authorities

Cases:

Alston v. Manson, 791 F.2d 255 (2d Cir. 1986), *cert. denied*, 479 U.S. 1084, 107 S.Ct. 1285 (1987) 27

Berryhill v. Zant, 858 F.2d 633 (11th Cir. 1988) 29

Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664 (1979) 26-29

In re Jury Plan of the Eastern District of New York, 27 F.3d 9 (2d Cir. 1994) 25

Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531 (1980) 19

Ricketts v. City of Hartford, 74 F.3d 1397 (2d Cir. 1996) 27

Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692 (1975) 26, 27

Tome v. United States, __ U.S. __ , 115 S.Ct. 696 (1995) 20, 21

United States v. Adeniji, 31 F.3d 58 (2d Cir. 1994) 12

United States v. Armone, 363 F.2d 385 (2d Cir.), *cert. denied*, 385 U.S. 957, 87 S.Ct. 391 (1966) 11

United States v. Biaggi, 909 F.2d 662 (2d Cir. 1990), *cert. denied*, 499 U.S. 904, 111 S.Ct. 1102 (1991) 26

United States v. Brennan, 798 F.2d 581 (2d Cir. 1986), *cert. denied*, 490 U.S. 1022, 109 S.Ct. 1750 (1989) 20

United States v. Brown, 511 F.2d 920 (2d Cir. 1975) 11

United States v. Carr, 584 F.2d 612 (2d Cir. 1978), *cert. denied*, 440 U.S. 935 (1979) 6

United States v. Crisona, 416 F.2d 107 (2d Cir. 1969), *cert. denied*, 397 U.S. 961, 90 S.Ct. 991 (1970) 11

United States v. Dove, 916 F.2d 41 (2d Cir. 1990) 11

United States v. Eisen, 974 F.2d 246 (2d Cir. 1992), *cert. denied*, 507 U.S. 998, 113 S.Ct. 1619 (1993) 12

United States v. Erb, 543 F.2d 438 (2d Cir.), *cert. denied*, 429 U.S. 981 (1976) 6, 11, 13, 14

United States v. Fernandez, 480 F.2d 726 (2d Cir. 1973) 26

United States v. Garces, 849 F.Supp. 852 (E.D.N.Y. 1994) 29

United States v. Innamorati, 996 F.2d 456 (1st Cir. 1993), *cert. denied*, __ U.S. __, 114 S. Ct. 1073 (1994) 22, 23

United States v. Jackman, 46 F.3d 1240 (2d Cir. 1995) 27

United States v. LaChance, 788 F.2d 856 (2d Cir.), *cert. denied*, 479 U.S. 883, 107 S.Ct. 271 (1986) 27

United States v. Lloyd, 10 F.3d 1197 (6th Cir. 1993), *cert. denied*, 114 S.Ct. 1569 (1994) 22

United States v. Macchia, 844 F.Supp. 920 (E.D.N.Y. 1994) 24

United States v. Osorio, 801 F.Supp. 966 (D. Conn. 1992) 27-30

United States v. Ouimette, 798 F.2d 47 (2d Cir. 1986), *cert. denied*, 488 U.S. 863, 109 S.Ct. 163 (1988) 11

United States v. Pierre, 781 F.2d 329 (2d Cir. 1986) 20

United States v. Quinto, 582 F.2d 224 (2d Cir. 1978) 20

United States v. Rosa, 11 F.3d 315 (2d Cir. 1993), *cert. denied*, __ U.S. __, 114 S.Ct. 1565 (1994) 21

United States v. Saa, 859 F.2d 1067 (2d Cir. 1988), *cert. denied*, 489 U.S. 1089, 109 S.Ct. 1555 (1989) 12

United States v. Serna, 799 F.2d 842 (2d Cir. 1986), *cert. denied sub nom.*, 481 U.S. 1013 (1987) 19

United States v. Taylor, 93 CR 711 (ERK) 24

United States v. Thomas, 11 F.3d 1392 (7th Cir. 1993) . . . 22

United States v. Torres, 845 F.2d 1165 (2d Cir. 1988) 11, 12

United States v. Tracy, 12 F.3d 1186 (2d Cir. 1993) 22

United States v. Vegas, 27 F.3d 773
(2d Cir. 1994) 18, 19

United States v. Winters, 33 F.3d 720 (6th Cir. 1994),
cert. denied, 115 S.Ct. 1148 (1995) 22

Williamson v. United States, __ U.S. __,
114 S.Ct. 2431 (1994) 20

Wright v. United States, 339 F.2d 578
(9th Cir. 1964) 12

Constitution, Statutes and Rules:

U.S. Constitution, Amendment VI 15, 24, 26, 27, 29, 30

18 U.S.C. § 2 3

18 U.S.C. § 3231 3

18 U.S.C. § 3551 *et seq.* 3

21 U.S.C. § 841 . . . . . 1, 3

21 U.S.C. § 846 . . . . . 1, 3

28 U.S.C. § 1254(1) 2

Fed. R. Crim. P. 30 . . . . . 5, 12

Fed. R. Evid. 609 19

Fed. R. Evid. 613 18

Fed. R. Evid. 801 ..... 17, 19, 20

Fed. R. Evid. 804 20

Fed. R. Evid. 806 ..... 15-19, 21, 23

Other Authorities:

New York Law Journal, 3/8/94 25

Sand, Siffert, Loughlin & Reiss, *Modern Federal Jury Instructions* (Matthew Bender 1989) 6

Wigmore, On Evidence § 288 (3d ed. 1940) 11

No.: _____

In The

Supreme Court Of The United States

October Term, 1995

ARMINDO SOARES,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Armindo Soares respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, affirming his convictions for conspiring and attempting to possess cocaine with intent to distribute it, both in violation of 21 U.S.C. §§ 841(b)(1)(A)(ii)(II) and 846.

Opinion Below

The Court of Appeals' opinion affirming Soares' conviction appears at (PA: 1a).[1] The Court of Appeals' denial of Soares' rehearing petition appears at (PA: 19a).

Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals denied Soares' rehearing petition on December 11, 1995. Thereafter, Justice Ginsburg extended Soares' time to file this petition through April 9, 1996. (PA: 20a) This petition timely follows.

Constitutional and Statutory Provisions

Pursuant to this Court's Rule 14.1(f), the constitutional and statutory provisions involved in this petition appear verbatim at (PA: 22a). They are:

U.S. Constitution, Amendment VI.
18 U.S.C. §§ 2; 3231.
21 U.S.C. §§ 841; 846.
28 U.S.C. § 1254(1).
Fed. R. Crim. P. 30.
Fed. R. Evid. 609, 613, 801, 804, 806.

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[1] Numbers preceded by "PA:" refer to pages of the appendix to this petition. Numbers preceded by "T:" refer to pages of the trial transcripts, while numbers preceded by "D:" refer to documents in the record before the Court of Appeals.

Jurisdiction in the District Court

The District Court for the Eastern District of New York (Platt, D.J.) had jurisdiction under 18 U.S.C. §§ 2, 3231 and 3551 *et seq.*, as well as 21 U.S.C. § 841 and 846.

Statement of the Case

The essential components of the supposed drug conspiracy in this case were four: Mark Bahna, a conceded drug dealer and government informant who, coincidentally, was defendant Soares' brother-in-law; Glenn Schaeffer who, like Bahna, agreed to cooperate after his arrest; William Lombard, a childhood friend of Mr. Soares, who pleaded guilty immediately before trial, and defendant Armindo Soares.

Evidence concerning the existence and supposed parameters of the narcotics conspiracy was supplied by Schaeffer; by a confidential informant, Ralph Bencivengo; and by two additional cooperating witnesses -- Ron Sahi and Charles Costa. Apart from their confessed involvement in narcotics trafficking, most of these witnesses shared a common trait: each had been arrested at least twice and, in connection with those arrests, was offered *successive* cooperation agreements. Absent the suspect testimony of the cooperating witnesses, the government had *no evidence* to connect Soares with the amorphous and ever-changing conspiracy charged in this case.

Importantly, the government's parade of recidivists did not include the supposed kingpin of the charged conspiracy -- Mark Bahna. Like each of the other supposed penitents, Bahna breached his cooperation agreement. He differed from the others, however, in two material respects: he was related to Soares by marriage, and he appeared in virtually all of the consensual recordings. Thus, the government elected not to

produce Bahna at trial and, instead, introduced his recorded, out-of-court statements.

In the end, if the cooperating witnesses' self-serving testimony is discounted, the Government's case connecting Soares to the charged conspiracy rested entirely upon Soares' mere presence, on January 4, 1990, at the site of *failed* negotiations between a government informant and Soares' brother-in-law, Mark Bahna.

REASONS FOR GRANTING THE PETITION

I. SOARES' CONVICTION MUST BE REVERSED BECAUSE THE TRIAL COURT IMPERMISSIBLY BARRED THE JURY FROM DRAWING ANY INFERENCE FROM BAHNA'S ABSENCE.

As noted, Mark Bahna was the crucial, but absent, witness in this case. It was his out-of-court statements, introduced through tapes and through the testimony of the various cooperating witnesses, that formed the heart of the government's case. Although Bahna was found by the trial court to be equally available to both sides, there was nonetheless ample basis in the evidence for defense counsel to argue (a) that Bahna was a cooperating witness, and (b) the government did not call him because he would have exonerated Soares.

In this POINT, our argument concerns the Court's "Missing Witness" charge for a witness who was equally available to both sides. As we demonstrate *infra*, the governing law required the court to instruct the jury that it can draw an inference against either side from the failure of the witness to testify. Yet, the trial court, despite a defense request to this effect, instead *forbade* the jury to draw *any* inference from the government's failure to produce Mark Bahna. Even more

troubling is the fact that, by not advising defense counsel that his requested missing witness charge would not be given, the Court misled defense counsel into focusing on a reasonable doubt argument -- the government's failure to call Bahna as a witness -- which the Court barred the jury from considering.

A. THE APPLICABLE FACTS

On March 21, 1994, defendant submitted his requests to charge pursuant to Fed. R. Crim. P. 30. Defendant's request number seven (7) sought a charge regarding an "uncalled witness equally available." Specifically, defendant asked that the jury be charged as follows:

> If you find that a witness was either equally available or unavailable to both sides, you may infer that the testimony of the uncalled witness might have been unfavorable to the Government or to the defendant or to both. Alternatively, if the witness was unavailable to both the prosecution and the defense, you may simply disregard his possible testimony as a factor in this case.
>
> You should, however, remember that there is no duty on either side to call a witness whose testimony would merely repeat or duplicate testimony already in evidence. You should also recall my earlier instruction that the law never compels a defendant in a criminal case to call any witnesses or produce any evidence in his behalf.

[D#35, Defendant's Request to Charge No. 7[2]]

At the charging conference on March 22, 1994, the Court stated, "If you wish I will give an uncalled witness equally available charge, my charge on that." [T: 870] When pressed to clarify, the Court restated that it would give an uncalled witness charge concerning a witness "[e]qually available to both sides." [T: 871] The Court, however, denied counsel's request for a written, advance version of the charges. [T: 880]

Relying upon the Court's express assurance that an "uncalled witness equally available" charge would be given, counsel, in his summation to the jury, repeatedly referred to Mark Bahna's absence from the trial, and repeatedly urged the jury to draw an adverse inference -- against the government -- from this absence. Specifically, counsel argued:

> You heard [the prosecutor], Mark Bahna was a liar, a cheat, and lied to people in the drug business all the time. And that's what people do. So there is no reason for you to take Mark Bahna's word.... *And we will talk in a little while why Mark Bahna is not here.*
>
> * * *
>
> Now, I have one last major issue I want to discuss with you. And you know that

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[2] *Citing* Sand, Siffert, Loughlin & Reiss, *Modern Federal Jury Instructions* (Matthew Bender 1989), ¶ 6.04 at 6-22, Instruction 6-7; *United States v. Carr*, 584 F.2d 612 (2d Cir. 1978), *cert. denied*, 440 U.S. 935, 99 S.Ct. 1280 (1979); *United States v. Erb*, 543 F.2d 438 (2d Cir.), *cert. denied*, 429 U.S. 981, 97 S.Ct. 493 (1976).

cartoon, where is Waldo? We might say here, where is Mark? Where is Mark Bahna? *Why didn't the government call him as a witness?* The one witness who would be in a position to know about what Mark Bahna said, because most of this case is about what Mark Bahna said about Armindo Soares and not about what Armindo Soares may have done.

Now, it is true, and Mr. Nocella will probably point it out. I could have called him. He is, after all, Mark Bahna's brother-in-law. But as the Judge will instruct you, a defendant has no burden of proof in a criminal case....

So the defense had no obligation to bring Mark Bahna.

The real question is not why we should have brought him, but why didn't Mr. Nocella call him?

Remember Costa's testimony, Mark Bahna set him up with a tape recorder, and I remember everybody's face yesterday when you say, Jesus -- excuse me, my lord.

Mark Bahna was a cooperating witness? That's what Costa told you. In the spring of 1990 Mark Bahna was a cooperating witness, just like Bencivengo and just like Sahi and just like Glenn Schaeffer. And given the deals that the government made with each of these people, you have the right based upon this evidence, all that is before you, *you can infer that Mark Bahna has a similar deal. And if not how come*

the government didn't put on any proof showing that he didn't have a similar deal.

If Mark Bahna has such a deal, and you may conclude he does from the evidence before you in this trial, why wasn't he called as a witness?

There is an obvious answer ladies and gentlemen. Unlike the other witnesses in this case, who are not married to Armindo Soares' sister, Mark Bahna obviously couldn't bring himself in here and lie about Armindo Soares to help himself. That's why the government didn't call him. They knew that he wouldn't lie, that he was insisting that Armindo Soares was innocent. And you could also conclude that Mark Bahna nonetheless didn't want to testify for Armindo Soares, because he -- you can conclude from the evidence that there is a cooperation agreement in effect and that Mark Bahna is afraid that he will lose it if he comes in here and gives evidence that the government would not like, and they could send him to jail for years and years and years.

* * *

You decide what is the fair evidence [sic] to draw?

You my state [sic] he would probably be unhelpful to the defendant. You might say I don't know what inference to draw. But the better inference to draw, the one that makes more sense, is that the government didn't call

> *him because his testimony didn't help the government.*
>
> *Isn't that enough for a reasonable doubt, the fact that they didn't call Mark Bahna, a cooperating witness who is in the best position to know, and would have so much to benefit, and wouldn't come in here and testify that Armindo Soares was involved in drugs. Look at what he would gain like all the other witnesses. And they didn't call him.*

[T: 919; 947-50 (emphasis added)]

Unfortunately, the jury never reached the merits of this argument because the Court, without prior notice, instructed the jury as follows:

> There are several other persons whose names you have heard during [the] course of this trial and one or more of the attorneys have referred to their absence from this trial. *Neither the defendant nor the government could benefit from the absence of such witnesses or possible witnesses because each side has an equal opportunity, or lack of opportunity, to have them testify.* If either side had wanted any of them here, so far as the record shows, they had equal opportunity to get them and *absence should not affect your judgment in passing on this case or in determining the guilt or innocence of the defendant.*

[T: 991 (emphasis added)] In essence, then, the Court's instruction served to charge defense counsel's argument right out of the case.

Following the completion of the charge, and in the absence of the jury, defendant made the following objection:

> Your Honor, the first objection, your charge on the equally available witness, as I heard the instruction to the jury, that they were to draw no inference either way from the failure of the government or the defense to call a witness that was equally available.
>
> I respectfully request that your Honor instruct the jury, as I believe the law requires your Honor to do so, not that they should draw no inference, but they have a choice of inferences to draw, they can draw an inference that the witness would have testified favorably to the defendant or favorably to the government, or they can draw an inference that the witness -- rather than do it off the top of my head, perhaps I should read you exactly the language I would like.

[T: 1003-1004]

The Court denied the request, ruling that:

> I am not going to change it. It is my standard language. I used it for 20 years. It is in Devitt & Blackmar. It is a charge that is accepted and I will not give yours.

[T: 1004]

Thereafter, defense counsel completed the preservation of his record by stating: "Request number seven is what I would want." [*Id.*]

B. THE RELEVANT LAW APPLIED TO THE FACTS

To succeed on a challenge to a district court's jury instruction, an appellant must show that (i) the requested charge accurately reflected the law, and (ii) viewing the charge actually given as a whole, he was prejudiced. *United States v. Torres*, 845 F.2d 1165, 1171 (2d Cir. 1988) (*citing United States v. Ouimette*, 798 F.2d 47, 49 (2d Cir. 1986), *cert. denied*, 488 U.S. 863, 109 S.Ct. 163 (1988)). *See also United States v. Dove*, 916 F.2d 41, 45 (2d Cir. 1990) (in determining whether jury instruction prejudiced defendant, the Court appraises significance of error in instructions by comparing instructions actually given with those that should have been given). As we now proceed to demonstrate, defendant is able to satisfy both prongs of this test.

Courts have long recognized that, when a witness is equally available to both sides, "'[t]he more logical view is that the failure to produce ... is *open to an inference against both parties*.'" *United States v. Erb*, *supra*, 543 F.2d at 444 (*quoting* Wigmore, On Evidence § 288 (3d ed. 1940) (emphasis added and in original)); *see also United States v. Brown*, 511 F.2d 920 (2d Cir. 1975) (noting in *dictum* that, if there had been an "equally available" witness, instruction that no adverse interest could be drawn "might well be error"); *United States v. Crisona*, 416 F.2d 107, 118 (2d Cir. 1969) ("we have long held that it is proper to instruct the jury that 'the failure to produce such a witness is *open to an inference*...'" (emphasis added) (citations omitted), *cert. denied*, 397 U.S. 961, 90 S.Ct. 991 (1970); *United States v. Armone*, 363 F.2d 385, 405 (2d Cir.) (where witness was equally available, instruction permitting inference "was a correct statement of the law..."), *cert. denied*, 385 U.S. 957, 87 S.Ct. 391 (1966).

In *United States v. Erb*, *supra*, the Second Circuit Court declined to grant a reversal based upon the district court's instruction that no inference could be drawn from the absence of

an equally available witness. 543 F.2d at 445. In that case, however, the claim that the judge erred in not following the Court's general rule was *not* called to his attention and, "for that reason alone," the claim of error did not warrant reversal. *Id.* More importantly, the appellant in that case neither requested the charge, *nor did counsel argue the issue to the jury. Id.*

Here, in contrast, the request for the charge was timely made and, more importantly, the Court assured counsel that the charge would be given. Thereafter, counsel argued the point to the jury extensively and, following the charge, preserved his objection to the error by providing the Court with the language (Request to Charge Number Seven) he claimed should be used.

The effect of the trial court's action was devastating. This was *not* a case where the judge simply "'refrain[ed] from commenting on the inference to be drawn on the facts before the jury and allow[ed] counsel instead to argue the inference.'" *United States v. Saa*, 859 F.2d 1067, 1076 (2d Cir. 1988) (*quoting United States v. Torres, supra*, 845 F.2d at 1171), *cert. denied*, 489 U.S. 1089, 109 S.Ct. 1555 (1989). Instead, the Court effectively sandbagged counsel by (i) indicating that the charge would be given as requested; (ii) remaining silent while counsel argued the issue at length to the jury; and (iii) giving an instruction which informed the jury that such inference was impermissible. Under these circumstances, the Trial Court left the indelible impression that defense counsel had misled the jury. *See United States v. Adeniji*, 31 F.3d 58, 64 (2d Cir. 1994) (violation of Fed. R. Crim. P. 30 warrants reversal "where the defendant can show that he was 'substantially misled in formulating his arguments' or otherwise prejudiced") (*internal quote from United States v. Eisen*, 974 F.2d 246, 256 (2d Cir. 1992), *cert. denied*, 507 U.S. 998, 113 S.Ct. 1619 (1993)); *Wright v. United States*, 339 F.2d 578, 579-80 (9th Cir. 1964) (reversal required where court did not respond to defense request for pre-summation ruling on requests to charge, advised

counsel to "go ahead and argue the case any way you want to argue it," and, in its charge, rejected the theory of defense offered in summation).

Moreover, the charge given in this case was particularly damaging, since Soares was repeatedly referred to in Bahna's out-of-court statements as his "brother-in-law." Under those circumstances, the jury could hardly help speculating why Soares was unwilling to produce a *family member* to support his case. Indeed, the Court may have reinforced this natural tendency, when it further instructed the jury to "[c]onsider also any *relation* each witness may bear to either side of the case...." [T: 988 (emphasis added)]

In sum, it is plain that the Trial Court deprived the jury of an important tool in its deliberations, by erroneously instructing the jury that it could draw *no* inference from Mark Bahna's absence at trial. As a result, defendant was simply charged right out of his case.

C. THE REASONS WHY THE COURT OF APPEALS' DECISION IS ERRONEOUS

In rejecting the foregoing arguments, the Second Circuit tacitly rewrote *Erb*'s "general rule," 544 F.2d at 445, favoring charges that allow adverse inferences in circumstances such as these. Thus, citing a string of out-of-Circuit cases, the Court (a) announced that *two* "uncalled witness [--] equally available [instructions]" (PA: 6a) (internal quotes omitted) -- one permitting and the other prohibiting adverse inferences -- are now appropriate (PA: 7a), and (b) suggested, in direct contravention of *Erb*, that the latter alternative is actually preferred. (*Id.*)

Thereafter, the Court went on expressly to leave the issue unresolved:

> As pointed out in *United States v. Erb, supra, the various panels of this Court have not spoken with one voice in their choice of one or the other of the two above alternatives....* Where, as in the instant case, the district court instructs the jury that the defendant is not compelled to produce any witnesses, *there may be some question as to which of the two alternative charges would be more logical. We see no need to debate that issue here*, as either charge passes muster.

(PA: 8a) (emphasis added)

Thus, to the extent that the Court's decision (a) departs from, or implicitly overrules, *Erb* and related cases, and/or (b) recognizes, but declines to resolve, a split in the authority on this very important issue, we ask this Court to clarify for the lower courts which of the two charges it prefers.

In our view, the "no inference" charge tacitly endorsed by the Second Circuit not only runs counter to the governing law, but would place unnecessary restraints on the jury's sole discretion as fact-finder, and render *any* "uncalled witness [--] equally available [instruction]" (PA: 6a) (internal quotes omitted) a dead letter. After all, absent reliance on impermissible or unconstitutional considerations, we ask why the jury should be artificially restricted from drawing *any* inferences it pleases?

II. SOARES' CONVICTION MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY PRECLUDED HIM FROM IMPEACHING BAHNA'S CREDIBILITY, DESPITE THE FACT THAT BAHNA'S INCULPATORY STATEMENTS HAD BEEN ADMITTED THROUGH OTHER WITNESSES.

As we have demonstrated, this case begins and ends with the testimony of informants and cooperating witnesses, including Soares' absent brother-in-law, Mark Bahna. However, Bahna himself did not testify at trial. Instead, the government selectively offered Bahna's out-of-court statements, in which Bahna planned and negotiated drug transactions and in which, according to the cooperating witnesses, he purportedly implicated Soares in his scheme. In selecting these out-of-court statements, the government omitted mention of additional statements in which Bahna *exculpated* his brother-in-law. The Trial Court subsequently barred Soares from introducing these latter statements.

As we show below, both the Sixth Amendment and Fed. R. Evid. 806 required that the excluded evidence be admitted, for only by that evidence could Soares fully and effectively confront his absent "accuser." The Trial Court's error in excluding that crucial evidence now requires a new trial for defendant.

A. THE RELEVANT FACTS

On April 13, 1990, Mark Bahna was debriefed by Special Agent Robert Yoos with respect to Armindo Soares. During that debriefing, Bahna made the following statements:

a. Soares' car was used on January 4, 1990 only because it was the last car in the driveway;
b. Bahna told Bencivengo on January 4 not to talk at all in front of Soares;
c. The only conversation in front of Soares on January 4 was Bencivengo's request to smoke in the car;
d. Soares had no prior knowledge that Bahna was planning on buying cocaine; and
e. To the best of Bahna's knowledge, Soares was not carrying a gun on January 4.

In light of this debriefing, which is memorialized in a DEA-6 prepared by Agent Yoos [D #46, Government Exhibits], defendant sought permission by letter application [D #36, Letter of Judd Burstein] to question Agent Yoos about these statements. T*he Court conceded that Bahna's exculpatory statements were admissible under Fed. R. Evid. 806*, but conditioned their admission upon the defense acceding to the admission of Bahna's subsequent, *inculpatory* statements.

In reaching this decision, the Court first made a credibility determination regarding the *absent* witness. Specifically, the Court found that Bahna's exculpatory statements were "self-serving and exculpatory and made for the obvious purpose of exonerating his wife's brother and his close friend." [T: 826] The Court then reasoned that it could not "in good faith submit to the jury a potential true statement, one which the Court and counsel knows for a fact had been recanted shortly after it was made." [T: 827][3]

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[3] In fact, as counsel pointed out to the Court, the recantation took place months later. [*Id.*]

In the face of the foregoing, Soares declined to introduce Bahna's exculpatory statements, while reserving all objections to the Court's ruling. [T: 703-08; 825-27]

As we now proceed to demonstrate, the Trial Court improperly conditioned receipt of Bahna's exculpatory statements by threatening, in essence, to suspend the rules of evidence. Put simply, defendant's introduction of Bahna's exculpatory statements would have authorized the government to rehabilitate its absent witness with *admissible* evidence; it did not, however, permit the government to utilize rank hearsay.

B. BAHNA'S EXCULPATORY STATEMENTS WERE ADMISSIBLE UNDER RULE 806; HIS SUBSEQUENT "RECANTATION", HOWEVER, WAS INADMISSIBLE HEARSAY

As indicated, Bahna's out-of-court statements were introduced through cooperating witnesses and through consensual tape recordings. Although Bahna did not appear at trial, his statements were admissible as co-conspirator statements made during the course of and in furtherance of the conspiracy. Fed. R. Evid. 801(d)(2)(E).

The admission of Bahna's statements permitted Bahna's credibility to be attacked -- and, in theory, supported -- in accordance with Fed. R. Evid. 806. That Rule provides in relevant part:

> When a ... statement defined in Rule 801(d)(2) ... has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant *at any*

> *time*, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain.

Fed. R. Evid. 806(b) (emphasis added).

Under Rule 806, Mr. Bahna's out-of-court statements were subject to impeachment by his subsequent statements to Agent Yoos. This is so because Fed. R. Evid. 613 permits extrinsic proof of inconsistent statements. And, surely, Bahna's April 1990 exculpatory statements to Agent Yoos contradict his alleged coconspirator claims that Mr. Soares was his partner in the drug business.

The remaining question is whether the government was entitled to offer Bahna's subsequent post-arrest statements. Concededly, Rule 806 permitted the government to rehabilitate Mr. Bahna as if he had uttered his hearsay statements as a witness. The issue, however, is whether Mr. Bahna's other statements, *which all post-date his April 17, 1990 statement*, would have been admissible had Bahna testified at this trial. Judicial pronouncements concerning the issue of rehabilitation under Rule 806 suggest that those statements would *not* be so admissible.

For example, in *United States v. Vegas*, 27 F.3d 773 (2d Cir. 1994), the Court confirmed that Rule 806 permits the government to rehabilitate a witness -- *provided that the government utilizes admissible evidence in doing so*.

In *Vegas*, which involved appeals from two separate trials, defendant Vegas had indirectly inculpated defendant Virella, by stating to another that his supplier had arrived from overseas. The government tied surveillance observations to Vegas' statement, and argued that Vegas was referring to

Virella. On his case, Virella was permitted to introduce, pursuant to Fed. R. Evid. 806, two exculpatory out-of-court statements made by Vegas, in which Vegas stated that Virella was not his source. Thereafter, also pursuant to Rule 806, the trial court permitted the government to offer a portion of Vegas' (separate) trial testimony to demonstrate his unreliability.

On appeal, the Second Circuit upheld the ruling permitting the government to impeach Vegas under Rule 806. Of crucial importance, however, is the fact that Vegas' out-of-court exculpatory statements were impeached with evidence that would have been admissible to impeach Vegas had he in fact testified. Specifically, since Fed. R. Evid. 801(d)(1) authorizes the admission of prior sworn testimony of a witness, the use of such testimony pursuant to Rule 806 was both correct and unremarkable.

The government's use of Rule 806 to rehabilitate a witness was also approved in *United States v. Serna*, 799 F.2d 842 (2d Cir. 1986), *cert. denied sub nom.*, 481 U.S. 1013, 107 S.Ct. 1887 (1987). In *Serna*, the trial court conditioned the admission of prior testimony of an unavailable witness upon informing the jury that the declarant was convicted by the panel which heard his testimony. On appeal, the Court upheld the ruling precisely because the declarant's conviction would have been admissible to impeach him had he testified. 799 F.2d at 850; *see* Fed. R. Evid. 609(a)(1).

In contrast to the statements whose use, for rehabilitation purposes, was approved in *Vegas, supra*, and *Serna, supra*, Bahna's recantation simply did not fall within a "firmly rooted" exception to the hearsay rule. *See Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 2539 (1980).

First, those statements would not be admissible as a statement against penal interest because such statements are

admissible only where the declarant is unavailable. Fed. R. Evid. 804(b)(3). Here, Bahna was plainly available. Further, even if some *portion* of Bahna's recantation was admissible as a supposed statement against penal interest, the *entirety* of that statement -- including, specifically, the portion inculpating Soares -- would *not* be admissible. *See Williamson v. United States*, __ U.S. __, 114 S.Ct. 2431, 2432 (1994) ("[T]he most faithful reading of Rule 804(b)(3) ... is that it does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory"). Thus, in this case, as in *Williamson*, it cannot be said that *all* Bahna said -- including his supposed "recantation" -- was admissible.

Second, Bahna's statements were offered to rehabilitate Bahna, not to contradict him. Thus, they were not admissible as prior inconsistent statements.

Third, the statements were also inadmissible as prior consistent statements. Under Fed. R. Evid. 801(d)(1)(B) a prior consistent statement is admissible if offered to rebut a charge of recent fabrication or improper influence or motive. Put differently, "the prior statement must have been made before the declarant had a motive to fabricate." *United States v. Brennan*, 798 F.2d 581, 587 (2d Cir. 1986), *cert. denied*, 490 U.S. 1022, 109 S.Ct. 1750 (1989) (*citing United States v. Quinto*, 582 F.2d 224, 232 (2d Cir. 1978)); *see Tome v. United States*, _ U.S. _, 115 S.Ct. 696 (1995). This was not the case here, where Bahna made the statements following his arrest.

Nor would Bahna's post-arrest statements fall within the rule of *United States v. Pierre*, 781 F.2d 329 (2d Cir. 1986), and related cases. In *Pierre*, the Court endorsed a relaxed standard when (1) the prior consistent statement is used for rehabilitation, and (2) the prior statement tends to cast doubt on either (a) whether the prior inconsistent statement was made, or (b)

whether the impeaching statement is really inconsistent with the trial testimony. 781 F.2d at 333. In the first instance, we question the continued vitality of these authorities in light of *Tome*. However, assuming such vitality *arguendo* -- an issue we urge the Court to address here -- Bahna's statements to Agent Yoos were unquestionably inconsistent with Bahna's previously admitted out-of-court statements, and Agent Yoos' testimony would have made it unequivocally clear that the statement was made.

Finally, the proposed introduction of Bahna's exculpatory statements would not have "opened the door" to his subsequent, supposed "recantation." As the Court explained in *United States v. Rosa*, 11 F.3d 315, 335 (2d Cir. 1993), *cert. denied*, __ U.S. __, 114 S.Ct. 1565 (1994), in order "*[t]o be admissible under this doctrine, the evidence that allegedly 'opened the door' must in fact have been inadmissible. Properly admitted evidence does not open the door to inadmissible evidence*." (emphasis added) (citation omitted) In this case, the government properly conceded that Bahna's exculpatory statements were admissible under Rule 806. Consequently, the rules of "opening the door," or "curative admissibility," were inapplicable.

In sum, the simple fact here is that if the government wanted to put Mr. Bahna's more recent accounts of what transpired before the jury, it should have enforced its cooperation agreement with Mr. Bahna and called him as a witness. Having chosen not to do so, however, and instead having chosen to rely upon his alleged coconspirator declarations, the government should have been barred from seeking to rehabilitate Bahna through inadmissible hearsay. The Court's refusal to adopt this reasoning now necessitates a new trial.

C. THE REASONS WHY THE COURT OF APPEALS' DECISION IS ERRONEOUS

Eschewing the merits of the foregoing arguments, the Second Circuit opined in a single conclusory paragraph that Bahna's debriefing statements had been inadmissible in the first place:

> In determining whether the district court erred in thus conditioning the admissibility of the exculpatory evidence, we first must determine whether the evidence otherwise would be admissible. We hold that it would not. *Testimony by the DEA agent concerning statements made to him by a non-testifying coconspirator would be hearsay unless the statements were made during the course of and in furtherance of the conspiracy. See United States v. Tracy*, 12 F.3d 1186, 1196 (2d Cir. 1993); *United States v. Inmamorati*, 996 F.2d 456, 481 (1st Cir. 1993)[, *cert. denied*, __ U.S. __, 114 S. Ct. 1073 (1994)]. Objections to statements as hearsay are not solely the prerogative of the defendant. *United States v. Winters*, 33 F.3d 720, 723 (6th Cir. 1994), *cert. denied*, 115 S.Ct. 1148 (1995); *see also United States v. Thomas*, 11 F.3d 1392, 1399 (7th Cir. 1993); *United States v. Lloyd*, 10 F.3d 1197, 1216-17 (6th Cir. 1993), *cert. denied*, 114 S.Ct. 1569 (1994). *Because the district court could have precluded the testimony of Bahna's exculpatory statements, it did not err in conditioning its admissibility as it did.*

(PA: 9a-10a) (emphasis added)

With all respect, this analysis misses the mark. In essence, the Court found that there was no error here because Bahna's post-arrest, debriefing statements were themselves inadmissible as "co-conspirator hearsay" in that they were not made "during the course and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E).[4] However, *Soares did not offer the debriefing statements as "coconspirator hearsay."* Rather, they were proffered as *inconsistent statements to impeach Bahna's credibility*.

Hence, the debriefing statements were not hearsay at all because Soares offered them for impeachment purposes, rather than for their truth. Indeed, the case relied upon by the Second Circuit itself reaffirms this very distinction. *See United States v. Innamorati, supra*, 996 F.2d at 481 ("Scott's statements to O'Brien during the debriefing would have been inadmissible hearsay *if offered for their truth (as opposed to impeachment)*") (emphasis added).

Moreover, as previously explained, *there was never any dispute as to the admissibility of Bahna's debriefing statements.* Rather, *the government and even the Trial Court conceded that they were admissible under Rule 806.* This being so, the Second Circuit surely misstepped in concluding otherwise. Accordingly, this Court should proceed to a determination of Soares' substantive claim: that the Trial Court erred in conditioning the debriefing statements' admissibility upon the reception of Bahna's (otherwise inadmissible) alleged "recant[ation]." (PA: 9a)

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[4] We recognize that "co-conspirator hearsay" is a misnomer because the Rule labels such statements non-hearsay, rather than hearsay exceptions. For ease of reference, however, we use the familiar but technically inaccurate term "co-conspirator hearsay."

III. SOARES' CONVICTION MUST BE REVERSED BECAUSE BLACKS AND HISPANICS WERE DSIPROPORTIONATELY EXCLUDED FROM HIS JURY, IN CONTRAVENTION OF THE SIXTH AMENDMENT AND THIS COURT'S PRECEDENTS.

Soares was tried in the Eastern District of New York, which has Courthouses in Brooklyn and Uniondale, Long Island. Although all of the acts and agreements at issue in this case occurred in Brooklyn or Manhattan, Soares stood trial at the Uniondale Courthouse.

Prior to trial, defendants in other cases[5] challenged the manner in which Eastern District juries are selected. More specifically, they argued, *inter alia*, that the existing method of forming jury pools resulted in underrepresentation of minorities in both the Brooklyn and Uniondale Divisions. On March 8, 1994, the *New York Law Journal* reported that Judge Edward Korman upheld defendant's challenge in *Taylor*, which was supported by:

> a statistical analysis from demographic experts that concluded that continued use of the [present] method of forming jury pools resulted in a 20 percent underrepresentation of minorities compared to what would be the case if a single master list were used for all locations. Similarly, the defense study concluded that continued use

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[5] *United States v. Taylor*, 93 CR 711 (ERK); *United States v. Macchia*, 844 F.Supp. 920 (E.D.N.Y. 1994) (LDW) (rejecting constitutional challenge to Eastern District's jury selection process).

> of a district-wide pool in Brooklyn, but a Nassau/Suffolk-only pool for Long Island, resulted in the overrepresentation of whites by 50 percent.

NYLJ, 3/8/94, p.7, col.2.

By letter dated March 9, 1994 [D#34, Letter of Judd Burstein], counsel for Mr. Soares apprised Judge Platt of the foregoing decision, and, based upon that authority, requested that the jury in this case be selected only from individuals residing in Kings, Queens, and Richmond Counties. In connection with that request, and in order to obviate administrative difficulties or inconvenience to jurors, defendant proposed that the case be tried in Brooklyn.

On March 11, 1994, the Court held a pretrial conference at which, *inter alia*, defendant's request was addressed.[6] Although the Court indicated its willingness to accommodate defendant's request, the Court left the ultimate decision to the government. Despite notice of the possible infirmities in the jury selection plan, the government elected to proceed with trial in Uniondale, and before a jury culled exclusively from Nassau and Suffolk Counties.

Thus, the Uniondale courthouse was selected *by the government*, despite the fact that this case otherwise had no connection to Long Island. In this POINT, we demonstrate that the government's choice deprived defendant of the opportunity

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[6] Notably, the Trial Judge had met with the Eastern District Board of Judges *the very week of defendant's application* to discuss, *inter alia*, the issues raised herein. *See, e.g., In re Jury Plan of the Eastern District of New York*, 27 F.3d 9 (2d Cir. 1994).

for a jury composed of a fair cross section of the District's community. That the government was apprised of this defect, and elected to proceed despite defendant's objection, requires even closer scrutiny by this Court. This is so since, as Judge Friendly recognized in *United States v. Fernandez*, 480 F.2d 726, 735 (2d Cir. 1973), "[T]he appearance of abuses, if not ... abuses, in the selection of what may be deemed a tribunal favorable to the prosecution" enhances a constitutional claim based on the exclusion of distinctive groups from the community of the tribunal selected. (Citation and internal quotations omitted)

A. THE RELEVANT LAW

This Court has held that systematic exclusion from the jury selection process of a distinctive group, resulting in a jury pool not reasonably representative of the community, denies the defendant his or her right to a jury selected from a "fair-cross-section" of that community. *Duren v. Missouri*, 439 U.S. 357, 363-64, 99 S.Ct. 664, 668 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 538, 95 S.Ct. 692, 701-02 (1975). While the Sixth Amendment's "fair cross section" requirement does not entitle a defendant to a jury that is actually representative of the community, it does entitle him or her to the "opportunity" for a representative jury. *United States v. Biaggi*, 909 F.2d 662, 678 (2d Cir. 1990), *cert. denied*, 499 U.S. 904, 111 S.Ct. 1102 (1991).

To make out a *prima facie* "fair-cross-section" claim under the Sixth Amendment, a defendant must show that (1) the group alleged to be excluded is a "distinctive" group in the community in which the crime was committed; (2) the representation of this group in the challenged pool is not "fair and reasonable in relation to the number of such persons in the community," and (3) the underrepresentation is due to "systematic exclusion" of the group. *Duren*, *supra*, 439 U.S. at

364, 99 S.Ct. at 668; *Taylor v. Louisiana, supra*, 419 U.S. at 538, 95 S.Ct. at 701-02; *United States v. LaChance*, 788 F.2d 856, 864 (2d Cir.), *cert. denied*, 479 U.S. 883, 107 S.Ct. 271 (1986).

The Sixth Amendment seeks to ensure that every defendant, no matter what their particular race or ethnicity, receives a jury which is representative of the community. For this reason, "standing" is not a requirement under the Sixth Amendment. *Taylor v. Louisiana, supra*, 419 U.S. at 526, 95 S.Ct. at 695. In addition, "discriminatory purpose" need not be established. *Duren, supra*, 439 U.S. at 368 n.26, 99 S.Ct. at 670 n.26; *United States v. Jackman*, 46 F.3d 1240, 1246 (2d Cir. 1995); *Ricketts v. City of Hartford*, 74 F.3d 1397, 1408 (2d Cir. 1996).

Finally, once a *prima facie* case is made, the government must demonstrate that the underrepresentation serves a significant or overriding government interest. *Duren, supra*, 439 U.S. at 368, 99 S.Ct. at 670.

B. UTILIZATION OF A VENIRE COMPOSED SOLELY OF RESIDENTS OF NASSAU AND SUFFOLK COUNTIES VIOLATED DEFENDANT'S SIXTH AMENDMENT RIGHT TO A JURY COMPOSED OF A "FAIR CROSS-SECTION" OF THE COMMUNITY

In this case, Soares challenges the use of the Long Island jury wheel, from which the District's black and Hispanic residents are disproportionately excluded. Blacks and Hispanics obviously constitute a "distinctive" group, and thus the first prong of the *Duren* test is met. *See Alston v. Manson*, 791 F.2d 255, 257 (2d Cir. 1986), *cert. denied*, 479 U.S. 1084, 107 S.Ct. 1285 (1987) (blacks are distinct group); *United States v. Osorio*, 801 F.Supp. 966, 977 (D. Conn. 1992) (same); *United States v. Jackman, supra*, 46 F.3d at 1246 (same).

The second prong of the *Duren* test requires a showing that the claimed underrepresentation of minorities on district-wide venires is statistically significant. Using the "voting age population" method typically employed by federal courts in determining jury composition challenges, *see Osorio*, *supra*, 801 F.Supp. at 977-78, we note that, according to the 1990 census, the voting age (over 18 years old) population of the District is approximately 5.5 million, of which approximately 988,000 (17.9%) are black, and approximately 727,500 (13.2%) are Hispanic. Thus, blacks and Hispanics together constitute approximately 31.1% of the voting age population of the District. By contrast, the voting age population of Long Island is approximately 2 million, of which approximately 129,000 (6.5%) are black, and approximately 117,000 (5.9%) are Hispanic. Hence, blacks and Hispanics together constitute approximately 12.4% of the voting age population of the Long Island Division. The resulting percentage difference between the District's and the Division's voting age black and Hispanic population is 18.7%.

Once this "benchmark" has been established, the "absolute numbers" methodology requires a calculation of the percentage difference between a group's proportion of the population, and its proportion in the relevant jury pool. *United States v. Osorio*, *supra*, 801 F.Supp. at 977. As indicated, the percentage difference in this case for blacks and Hispanics collectively is 18.7% (31.1% [percentage of District-wide voting population] minus 12.4% [percentage of Long Island Division population]).

Finally, this percentage differential must be multiplied by the number of persons in a typical jury venire; this step permits the Court to determine the number of persons from the excluded group that would have to be added to the venire to account for the group's underrepresentation. Apparently, the typical jury venire in the Eastern District of New York is 50 persons. *See*

United States v. Garces, 849 F.Supp. 852, 859 (E.D.N.Y. 1994) (Chief Judge Platt adopting 50 person figure as typical number in jury venire in deciding fair cross-representation challenge). Hence, multiplying the percentage difference of 18.7% by the assumed venire of 50 results in an absolute racial minority disparity of 9.35 persons. That is, more than nine blacks and Hispanics collectively would have to be added to the typical venire to make up for those groups' underrepresentation.

Clearly, the foregoing demonstrates that the proportion of blacks and Hispanics in a typical venire is unfair and unreasonable, as required by the second prong of the *Duren* test. *See Osorio*, *supra*, 801 F.Supp. at 979 (finding underrepresentation which required addition of only two blacks and two Hispanics to a jury venire made out a *prima facie* Sixth Amendment violation).

The third and final prong of the *Duren* test[7] examines whether the underrepresentation is due to a "systematic exclusion;" that is, "if the effect of implementing the [jury selection] plan leads to systematic (*i.e.*, *not occasional*) exclusion, this prong is satisfied." *Osorio*, *supra*, 801 F.Supp. at 980 (emphasis added) (*citing Duren*, *supra*, 439 U.S. at 366-67, 99 S.Ct. at 669-70).

In fact, the existing Jury Selection Plan of the Eastern District (the "Plan") is not only "systematic," but infects *both* the

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[7] In *Duren*, the Court suggested that if the first two elements of a *prima facie* violation are established, the third element --"systematic" exclusion -- is presumed. *See Duren*, *supra*, 439 U.S. at 363-68, 99 S.Ct. at 668-70; *see also Berryhill v. Zant*, 858 F.2d 633, 638 (11th Cir. 1988). Despite this suggestion, we proceed to establish the third element of the *Duren* test.

Brooklyn Courthouse and the Long Island Division. This is so because the Plan currently provides that (i) a Master Jury Wheel for the Brooklyn Courthouse utilizes the names of persons from *all five Counties* of the Eastern District, while (ii) the Long Island Division utilizes the names of persons *only from Nassau and Suffolk Counties*. The necessary effect of these provisions is that the largely white suburban counties are overrepresented or double-counted in the composition of the District's juries: Nassau and Suffolk Counties are represented in *both* the Brooklyn and Long Island Division master jury wheels, while the District's urban counties are represented *only* in the Brooklyn wheel. Consequently, by overrepresenting the white suburban counties in the petit juries of the District, the Plan would necessarily -- and systematically -- cause the black and Hispanic population of the District's urban counties to be underrepresented. The government having failed to show that a significant governmental purpose is advanced by this systematic underrepresentation, *Osorio*, *supra*, 801 F.Supp. at 980, there can be no doubt that defendant's Sixth Amendment rights have been violated, thus requiring reversal of his conviction.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,
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Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1369 - August 1994
(Argued June 29, 1995 Decided October 5, 1995)

Docket No. 94-1566

UNITED STATES OF AMERICA,
Appellee,

v.

MARK BAHNA and ARMINDO SOARES,
Defendants-Appellants.

BEFORE: VAN GRAAFEILAND, MINER, Circuit Judges, and COTE, District Judge.*

Appeal from a judgement of the United States District Court for the Eastern District of New York (Platt, C.J.) convicting defendant, after a jury trial, of conspiring and attempting to possess with intent to distribute cocaine.

Affirmed.

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* The Honorable Denise Cote of the United States District Court for the Southern District of New York, sitting by designation.

Appendix A
Order of the United States Court of Appeals

BARBARA D. UNDERWOOD, Chief Assistant United States Attorney, Eastern District of New York, Brooklyn, New York (Zachary W. Carter, United States Attorney, Peter A. Norling, Joseph Nocella, Assistant United States Attorneys, Eastern District of New York, Brooklyn, New York, of counsel), for Appellee.

JUDD BURSTEIN, New York, New York (Kim P. Bonstrom, New York, New York, of counsel), for Defendant-Appellant Soares.

VAN GRAAFEILAND, Circuit Judge:

In June 1990, Armindo Soares was convicted after a jury trial in Brooklyn of conspiring and attempting to possess cocaine with intent to distribute. On July 31, 1991, Judge Raggi, before whom the case was tried, ordered a new trial because of what Judge Raggi concluded was an erroneous ruling concerning character evidence. In March 1994, Soares was retried before Chief Judge Platt in Uniondale and again was convicted. Once more, Soares contends that the verdict was tainted. However, this time his contention is without merit.

Although Soares describes the case against him as a close one, he does not, and reasonably cannot, argue that the evidence viewed in the light most favorable to the Goverment was insufficient to support the verdict. The Government established, largely through the testimony of coconspirators, that Soares and his brother-in-law, Mark Bahna, were involved in a large-scale cocaine trafficking network. One witness testified that he had seen Soares buying cocaine and had been asked repeatedly by Soares whether he had heard anything about a cocaine shipment.

Appendix A
Order of the United States Court of Appeals

The witness also had been told by another coconspirator that Soares was in the business of selling cocaine and that a local organized crime figure, Rocco Arena, was attempting to extort "tribute" from Soares for encroaching on Arena's territory. Another witness testified that he had discussed prices, quality and brands of cocaine with defendant and Bahna, and that he had seen defendant purchase cocaine from Bahna and once return about 800 grams of cocaine to Bahna, stating that his customers were complaining about the quality. The witness also testified that he and Bahna were stopped by Arena, who told Bahna that Soares had to pay tribute, and that Soares had refused to do so. The witness later learned that one of Soares' employees had been pistol-whipped because of Soares' refusel. A third witness testified that Bahna once warned him not to mention prices in front of Bahna's wife, Soares' sister, because Bahna sold cocaine to Soares at a higher price. He also testified that Bahna once mentioned that some of the cocaine he was purchasing was for Soares. In addition, the Government introduced several incriminating tape recordings of conversations between Bahna and one of his coconspirators.

In January 1990, the Drug Enforcement Administration, acting on information furnished by an informant, Ralph Bencivengo, decided to organize a sting operation involving Bahna. With Bencivengo's assistance, the DEA set up a sale of ten kilograms of sham cocaine to Bahna. On January 4, 1990, the DEA conducted surveillance at the site of the planned sale, a shopping center in Brooklyn. At 8:00 p.m., Bahna arrived at the paring lot in Soares' car, driven by Soares. Bahna temporaily left the car to meet with Bencivengo. Then they both entered the car and continued negtiating the cocaine sale. After Bahna

and Bencivengo placed a call at a pay telepone, the deal was postponed.

Bencivengo told the DEA agents that during these incidents Soares brandished a gun and threatened Bencivengo's life if he was wired. Bencivengo stated further that the deal fell through because Bahna insisted upon seeing a sample of the cocaine to determine its quality, while Bencivengo insisted upon seeing the $145,000 purchase money first.

On January 9, the sham deal was consummated. However, defendant was not present at that time. Instead, William Lombrand was with Bahna. Both Lombard and Bahna were arrested, and defendant was arrested thereafter.

The Goverment did not call Bahna as a witness. Defendant's first claim of error is addressed to the district court's "absent witness" instruction relating to Bahna's nonappearance. At the conclusion of the Government's case, Soares' counsel called as his sole witness a DEA agent, who already had testified, and counsel then rested. He thereafter submitted among other the following request to charge:

> If you find that a witness was either equally available or unavailable to both sides, you may infer that the testimony of the uncalled witness might have been unfavorable to the Government or to the defendant or to both. Alternatively, if the witness was unavailable to both the prosecution and the defense, you may simply disregard his possible testimony as a factor in this case .

Appendix A
Order of the United States Court of Appeals

> You should, however, remember that there is no duty on either side to call a witness whose testimony would merely repeat or duplicate testimony already in evidence. You should also recall my earlier instruction that the law never compels a defendant in a criminal case to call any witness or produce any evidence in his behalf.

This requested instruction was taken verbatim from an accepted treatise on federal jury instructions. However, insofar as it refers to equally unavailable witnesses in the leading sentence, it does not jibe with the "available witness" rationale and we find no case law to support it. Indeed, the only pertinent Second Circuit authority we have uncovered is directly to the contrary. *See United States v. Brown*, 511 F.2d 920, 925-26 (2d Cir. 1975); *United States v. Super*, 492 F.2d 319, 323 (2d Cir.), *cert. denied sub nom. Burns v. United States*, 419 U.S. 876 (1974). Moreover, there was no factual basis for an instruction concerning "equally unavailable" witnesses and "[o]rdinarily it is a mistake to give instructions on subjects not directly in issue in a case." *Clark v. Pennsylvania R.R. Co.*, 328 F.2d 591, 595 (2d Cir.) (quoted with approval in *De Chico v. Metro-North Commuter R.R*, 758 F.2d 856, 861 (2d Cir. 1985) and *O'Connell v. National R.R. Passenger Corp.*, 922 F.2d 1039, 1044 (2d Cir. 1991)), *cert. denied*, 377 U.S. 1006 (1964). Assuming for the sake of argument that the form instruction concerning equally unavailable witnesses might be appropriate in some cases, this was not such a case. Here, the charge could only be confusing and misleading. *See* 9A Wright & Miller, *Federal Practice and Procedure* § 2556 (1995). "[A] failure to grant a request for instructions that are in any respect incorrect

and unsound does not constitute error." *Clark, supra*, 328 F.2d at 595. In short, we think it would have been error for the district court to have charged the jury that it could draw an inference against either party for failing to call a witness who was not available to be called. As stated by Judge Friendly in *United States v. Leonard*, 524 F.2d 1076, 1084 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976), "[I]t is elementary that to put a trial court in error for declining to grant a requested charge, the proffered instructions must be accurate in every respect." The proposed charge herein did not satisfy this criterion.

In any event, the district court told defense counsel, "If you wish I will give an uncalled witness equally available charge, my charge on that." Thereafter, the court charged the jury as follows:

> There are several other persons whose names you have heard during [the] course of this trial and one or more of the attorneys have referred ot their absence from this trial. Neither the defendant nor the government could benefit from the absence of such witness ... because each side has an equal opportunity, or lack of opportunity, to have them testify. If either side had wanted any of them here, so far as the record shows, they had equal opportunity to get them and absence should not affect your judgment in passing on this case or in determining the guilt or innocence of the defendant.

Appendix A
Order of the United States Court of Appeals

> Bear in mind, of course, that the law never imposes upon the defendant in a criminal case the burden of producing or calling any witnesses or producing any evidence.

Defense counsel argues that this was reversible error. We disagree. When a witness equally available to both sides is not called by either, the trial court may in its discretion give one of two charges: (1) the court may instruct the jury that no unfavorable inference can be drawn against either side; or (2) the court may instruct the jury that under the circumstances the jury may draw an unfavorable inference against both sides. *See United States v. Erb*, 543 F.2d 438, 444-45 (2d Cir.), *cert. denied*, 429 U.S. 981 (1976). A review of decisions from other circuits discloses that the majority of them favor the first alternative, i.e., no unfavorable inference against either side. *See, e.g., United States v. Currier*, 454 F.2d 835, 839 (1st Cir. 1972); *United States v. Busic*, 587 F.2d 577, 586 (3d Cir. 1978), *rev'd and remanded on other grounds*, 446 U.S. 398 (1980); *United States v. Fisher*, 484 F.2d 868, 870 (4th Cir. 1973), *cert. denied*, 415 U.S. 924 (1974); *United States v. Chapman*, 435 F.2d 1245, 1247 (5th Cir. 1970), *cert. denied*, 402 U.S. 912 (1971); *Rostello v. United States*, 36 F.2d 899, 902 (7th Cir. 1929); *Johnson v. United States*, 291 F.2d 150 , 155 (8th Cir.), *cert. denied*, 368 U.S. 880 (1961); *Wagner v. United States*, 264 F.2d 524, 531 (9th Cir.), *cert. denied*, 360 U.S. 936 (1959).

It is not surprising, therefore, that this "no unfavorable inference" charge is the one that has been adopted by Devitt, Blackman, Wolff & O'Malley in their authoritative work, 1 *Federal Jury Practice and Instructions* § 14.15, at 458 (1992).

Appendix A
Order of the United States Court of Appeals

Chief Judge Platt told counsel that he had been using this charge for twenty years.

As pointed out in *United States v. Erb, supra*, the various panels of this Court have not spoken with one voice in their choice of one or the other of the two above alternatives. Although the *Erb* panel stated its belief that the second alternative was the "more logical view," 543 F.2d at 444, it also stated that it would be "loath indeed to reverse" a conviction because of a district court's discretionary choice of the first alternative. *Id.* at 445. Indeed, as we subsequently pointed out in *United States v. Torres*, 845 F.2d 1165, 1171 (2d Cir. 1988), the *Erb* court affirmed the judement of conviction at issue therein despite the fact that district court gave the jury the "no unfavorable inference" charge. Where, as in the instant case, the district court instructs the jury that the defendant is not compelled to produce any witnesses, there may be some question as to which of the two alternative charges would be the more logical. We see no need to debate that issue here, as either charge passes muster.

There is no merit in the contention of defendant's counsel that his client was prejudiced because the district court did not give the second alternative charge after counsel had carped at some length in his summation about the asserted failure of the Government to produce evidence and call witnesses. The district court adequately covered the point as follows:

> The law does not require the prosecution to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear

> to have some knowledge of the matters in issue at this trial. Nor does the law require the prosecution to produce as exhibits all papers and things mentioned in the evidence.
>
> However, in judging the credibility of the witnesses who have testified, and in considering the weight and effect of all evidence that has been produced, the jury may consider the prosecution's failure to call other witnesses or to produce other evidence shown by the evidence in the case to be in existence and available.

Soares' second contention is that the district court erred in refusing to let in statements allegedly made by Bahna to a DEA agent tending to show that Soares was an innocent participant in the January 4, 1990 transaction. The district court rejected this evidence unless Soares consented to the admission of evidence that Bahna subsequently recanted these statements. Soares declined the district court's offer.

In determing whether the district court erred in thus conditioning the admissibilty of the exculpatory evidence, we first must determine whether the evidence otherwise would be admissible. We hold that it would not. Testimony by the DEA agent concerning statements made to him by a non-testifying coconspirator would be hearsay unless the statements were made during the course of and in furtherance of the conspiracy. *See United States v. Tracy*, 12 F.3d 1186, 1196 (2d Cir. 1993); *United States v. Innamorati*, 996 F.2d 456, 481 (1st Cir. 1993). Objections to statements as hearsay are not solely the

prerogative of the defendant. *United States v. Winters*, 33 F.3d 720, 723 (6th Cir. 1994), *cert. denied*, 115 S. Ct 1148 (1995); *see also United States v. Thomas*, 11 F.3d 1392, 1399 (7th Cir. 1993); *United States v. Lloyd*, 10 F.3d 1197, 1216-17 (6th Cir. 1993), *cert. denied*, 114 S. Ct 1569 (1994). Because the district court could have precluded the testimony of Bahna's exculpatory statements, it did not err in conditioning its admissibility as it did. The district court quite properly believed that the jury should get the complete picture concerning Bahna's hearsay statements. *See, e.g., United States v. Fayette*, 388 F.2d 728, 735 (2d Cir. 1968). Describing defense objections as "gamesmanship," the district court told defense counsel: "You don't get half a loaf. You want to bring out the loaf you bring out the whole loaf."

We need spend little time discussing defendant's third claim of error which is based upon the district court's exclusion of two tape-recorded conversations between Bahna and Bencivengo. In these conversation, Bahna expresses a reluctance to meet with Bencivengo to discuss drug matters because Bahna has to pick up Soares at the airport. Soares argues that this was evidence of an unwillingness on Bahna's part to discuss drugs in Soares' presence. The district court refused to admit the conversations because the reason for Bahna's reluctance was speculative. We agree.

As the reason for not wanting to meet with Bencivengo, Bahna stated: "I can't do it because they [Soares and another unknown person] are gonna be in the car. For me to come all the way to this neighborhood is ridiculous, I want to take the Van Wyck [Expressway]. I don't want to have to come all the way back." Based on this statement, it appears that the reason for Bahna's hesitance was simply that he did not want to drive

out of his way to meet the informant while transporting passengers. If so, the statement could be excluded as irrelevant under Fed. R. Evid. 401. At best, the cause for Bahna's reluctance was speculative, in which case the conversations could be excluded under Fed. R. Evid. 403. In any event, the district court's ruling did not constitute a prejudicial abuse of discretion.

Soares' final argument is that the district court erred in selecting the jury from the "Long Island Division" jury wheel. Again, we disagree. United States district courts in New York State are divided among four districts. 28 U.S.C. § 112. Each of them contains so-called jury "divisions," i.e., "counties, parishes, or similar political subdivisions surrounding the places where court is held." 28 U.S.C. § 1869(e). Each of them selects grand and petit juries pursuant to a plan adopted by the judges of the district and approved by the Judicial Conference of the Second Circuit, and, as a general rule, selections are made from the area surrounding the courthouse where the case is to be tried. For example, in the Northern District, which covers thirty-two counties, court may convene in any one of six cities, each in a different county. Under the District Rules, jurors are selected from the "division" in which the court sits. *See* Northern District General Rule 47.1. For cases tried in Syracuse, for example, jurors are drawn from Madison, Onondaga and Oswego Counties. For cases tried in Auburn, which is less than thirty miles from Syracuse, jurors are drawn from Cayuga, Cortland and Tompkins Counties.

In the Southern District, which covers eight counties but whose principal locus is Manhattan, jury panels for the district's supplemental court in White Plains are drawn from six counties,

none of which is in Manhattan. *See* Rule 31 of the Division of Business Among District Court Judges; Southern District.

In the Western District, where trials are held in either Buffalo or Rochester, jury panels are drawn from the eight counties nearest Buffalo for trials in that city and the nine counties nearest Rochester for trials in that city.

The Eastern District consists of the counties of Kings, Nassau, Queens, Richmond and Suffolk. In 1948, when Title 28 of the United States Code was enacted, Congress provided that "Court for the Eastern District shall be held at Brooklyn." *See* Judicial Code and Judiciary Act of 1948, ch. 646, § 112, 62 Stat. 869, 886. As the character of the district changed over the years, Congress deemed it adivisable to provide for additional court facilities, and the present statue, 28 U.S.C. § 112(c), provides that court shall be held in Brooklyn, Hauppauge and Hampstead (including the Village of Uniondale). According to the 1993-94 Second Circuit Redbook, three Eastern District Judges were stationed in Uniondale and one in Hauppauge.

In 1985, the judges of the Eastern District proposed a jury plan which provided in substance that jurors for the Brooklyn court would be drawn from the entire Eastern District but that jurors for the "Long Island Division" [Hauppauge and Hampstead (Uniondale)] would be drawn from Nassau and Suffolk Counties. *See In re Jury Plan of the Eastern Dist. Of New York*, 27 F.3d 9-10 (2d Cir. 1994). This plan was approved by the Judicial Council on July 1, 1985 and at least with respect to the Long Island Division, it was still in effect in 1994 when the instant case was tried.

Appendix A
Order of the United States Court of Appeals

As the foregoing paragraphs demonstate, the use of "division" jury panels was not unique in the Eastern District. The Judicial Council's approval of the separate Long Island Division jury wheel is not binding on this Court. However, in the absence of greater proof than has been presented herein, we are not prepared to say that the Judicial Council erred in its approval. It is well-settled that neither the jury selection statute nor the Constitution requires that jurors be drawn from an entire district. *See Lewis v. United States*, 279 U.S. 63, 72 (1929) (citing *Ruthenberg v. United States*, 245 U.S. 480, 482 (1958)); *see also United States v. Titus*, 210 F.2d 210, 212-13 (2d Cir. 1954); *United States v. Garces*, 849 F.Supp. 852, 856-57 (E.D.N.Y. 1994), and cases cited therein.

Soares admits, as he must, that there was no improper purpose or design in the creation of the Long Island Division jury wheel. *See United States v. Macchia*, 844 F.Supp. 920, 921 (E.D.N.Y. 1994). His argument in brief is that as of 1994 there was an under-representation of blacks and Hispanics in the Long Island Division as compared with the Eastern District as a whole. Putting aside for the moment the absence of evidentiary support for this argument, we suggest that it is based upon an improper premise. Where a jury venire is drawn from a properly designated division, we look to that division to see whether there has been any unlawful or unconstitutional treatment of minorities.

In the seminal case of *United States v. Gottfried*, 165 F.2d 360 (2d Cir.), *cert. denied*, 333 U.S. 860 (1948), Judge Learned Hand expressed this principle as follows:

Appendix A
Order of the United States Court of Appeals

> [D]istrict and circuit courts have had power since the first Judiciary Act of 1789 to divide a district territorially in the interestof an impartial trial, of economy, and of lessening the burden of attendance. There cannot be the faintest question of the constitutionality of this statute; the courts have again and again recognized its validity. Furthermore, it would be impossible in practice to administer it, if it were a condition that the divisions made must be so homogeneous that they showed an equal percentage of all possible groups. There are probably no districts in the Union, which can be divided without disclosing in the sections different racial, religious, political, social or economic percentages. To demand that they shall not, would be a fantastic pedantry which would serve no purpose and would put an end to the statute.

Id. at 364. For a further exposition of these principles *see United States v. Herbert*, 698 F.2d 98 (9th Cir.), *cert. denied*, 464 U.S. 821 (1983), where the Court said:

> The Jury Selection and Service Act specifically provides for splitting a district into divisions and using only one division's jury wheel for petit juries:
>
> > "[A]ll litigants in Federal court entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in

> the district *or division wherein the court convenes*."

28 U.S.C. § 1861 (emphasis added). A petit jury may be drawn constitutionally from only one division and not the whole district. *Ruthenberg v. United States*, 245 U.S. 480, 38 S.C.t 168, 62 L.Ed.2d 414 (1918); *United States v. Cates*, 485 F.2d 26, 29 (1st Cir. 1974). *See also United States v. Smith*, 463 F.Supp. [680, 685 (E.D. Wis. 1979)].

> Appellant John Herbert argues that there is a lower percentage of Native Americans in the Phoenix division than in the Prescott Division, and that the failure to transfer the case to the Prescott Division shows a systematic exclusion of Native Americans. As stated above, it is proper to draw a petit jury from only one division. Appellant made no showing that Native Americans within the single Phoenix Division were systematically excluded. The jury selection plan for the Phoenix Division was therefore constitutional.

Id. at 984. *See also Davis v. Warden, Joliet Correctional Inst. At Stateville*, 867 F.2d 1003, 1010-1011 (7th Cir.), *cert. denied*, 493 U.S. 920 (1989); *United States v. Test*, 550 F.2d 577 (10th Cir. 1976); *United States v. Jenkins*, 496 F.2d 57, 65 (2d Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); *United States v. Garces, supra*, 849 F.Supp. at 852, 856-58; *Jeffers v. United States*, 451 F.Supp. 1338, 1345-46 (N.D.Ind. 1978).

Appendix A
Order of the United States Court of Appeals

The foregoing discussion assumes that the argument Soares now makes was properly presented to the district court and preserved for review by this Court. It was not. As above stated, the jury selection plan at issue was in effect for at least nine years before the instant case was reached for trial. The case was assigned to Chief Judge Platt two years prior to the date of trial. No motions addressed to the assignment, the place of trial or the method of jury selection were made during that period. Rule 50.2(f) of the Guidelines for the Division of Business for the Eastern District of New York provides in substance that any objection by a party to the designation of a judge or the place of trial in a criminal case must be made within ten days from the arraignment or from the initial notice of appearance, whichever is earlier.

The case against Soares and the coconspirator, William Lombard, was scheduled to go to trial before Chief Judge Platt on March 14, 1994.[1] By letter to Chief Judge Platt dated March 9, 1994, Soares' counsel referred to an article in the New York Law Journal which discussed in summary fashion a decision in a case involving a Brooklyn defendant, which apparently held that the Brooklyn defendant was entitled to have his jury drawn from Kings, Queens and Richmond Counties rather than from the district as a whole. Based solely on that newspaper article, Soares requested that the jury in the instant case "be culled only from Kings, Queens and Richmond Counties." No evidence was submitted in support of Soares' application. In an appearance before the district court on March 11th, three days prior to the

---

[1] Lomard pled guilty at the outset of trial and the trial proceeded against Soares alone.

scheduled trial date, at which counsel for codefendant William Lombard was not present, Soares' counsel stated that he was not challenging the assignment of the case to Chief Judge Platt. Counsel's position was that although the case was to be tried in Uniondale, it should be treated as though it was being tried in Brooklyn.

When informed by the district court that the creation of a new jury wheel covering only the counties of Kings, Queens and Richmond might take anywhere from three to six months, defense counsel changed his request from a three-county panel to a district-wide panel, if that could be accomplished in Uniondale, and otherwise the case be transferred to Brooklyn. Either alternative involved the departue from the Council-approved jury selection rules as they applied to Uniondale and as they apparently were interpreted to apply in Brooklyn. Moreover, transfer of the case to Brooklyn admittedly would result in substantial delay. As the prosecutor informed the court, this would be prejudicial to the Government in that the prosecutor had four cooperating witnesses on tap for the March 14th trial, two of whom had been relocated in other parts of the country because of their entry into the witness protection program and a third of whom was in custody. Section 1867(a) of 28 United States Code, which requires that challenges to jury panels be made promptly, was designed to prevent such prejudicial delay, and there is no good reason why its provision should not be enforced. *See United States v. Maldonado*, 849 F.2d 522, 523 (11th Cir. 1988); *United States v. Goetz*, 826 F.2d 1025, 1029 (11th Cir. 1987). This is particularly true where, as here, Soares' application was made without competent evident

to show that Soares could not get a fair trial in Uniondale. *See Goetz, supra*; at 1029.[2]

Having found no prejudicial error that would entitle Soares to a third trial, we affirm.

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[2] Because the Eastern District stretches over 150 miles in an area rife with traffic and transportation problems, it is not an ideal location for a district-wide jury wheel. As a result, there is a split of opinion among both judges and attorneys as to whether such a wheel should be adopted for all federal courts in the district. On July 17, 1995, the Judicial Council of the Second Circuit approved a one-year conditional plan for a district-wide pool covering all seats of the Eastern District courts. *See In re Jury Plan of the Eastern District of New York*, 61 F.3d 119 (1995). The conditional nature of the approved plan is indicative of the fact that it was not statutorily or constitutionally mandated in the instant case.

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 11th day of December one thousand nine hundred and ninety-five.

UNITED STATES OF AMERICA,

v. Dkt No. 94-1562 (L)
94-1566 (con)

BAHNA

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Armindo Soares.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED. It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court
GEORGE LANGE III, Clerk
By: /s/
Beth J. Meador,
Administrative Attorney

Letter of the United States Supreme Court

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

February 14, 1996

Mr. Judd Burstein
Burstein & Fass
99 Park Avenue
New York, NY 10016

Re: Armindo Soares
v. United States
Application No. A-672

Dear Mr. Burstein:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Ginsburg, who on February 14, 1996, extended the time to and including April 9, 1996.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By

/s/
Sandra Elliott Spagnolo
Assistant Clerk

Appendix A
Letter of the United States Supreme Court

NOTIFICATION LIST

Mr. Judd Burstein
Burstein & Fass
99 Park Avenue
New York, NY 10016

Mr. Drew S. Days III
Solicitor General
U.S. Department of Justice
Washington, DC 20530

George Lange III
United States Court of Appeals for
the Second Circuit
1702 US Courthouse, Foley Sq.
New York, NY 10007

Appendix B
Constitutional and Statutory Provisions

AMENDMENT VI -- JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 USC § 2 -- Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 USC § 3231 -- District courts

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

Appendix B
Constitutional and Statutory Provisions

21 USC § 841 -- Prohibited acts A

Unlawful acts

(a) Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a violation of subsection (a) of this section involving--

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;
(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or
(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 100 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 1 kilogram or more of a mixture or substance containing a detectable

amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph

shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving--

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;
(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;
(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or
(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

Appendix B
Constitutional and Statutory Provisions

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 10 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is

other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of

imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provision of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him in an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this

chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18. or $200,00 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed --

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of Title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual;

or both.

(6) Any person who violates subsection (a) of this section, or attempts to do so, and knowingly or intentionally uses

a poison, chemical or other hazardous substance on Federal land, and by such use --

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river or body of water,

shall be fined in accordance with Title 18, or imprisoned not more than five years, or both.

(c) Repealed. Pub. L. 98-473, Title II, § 224 (a) (2), Oct. 12, 1984, 98 Stat. 2030.

Offenses involving listed chemicals

(d) Any person who knowingly or intentionally --

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this title; or

(3) with the intent of causing the evasion of the record-keeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough

so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with Title 18, or imprisoned not more than 10 years, or both.

Boobytraps on Federal property; penalties; definitions

(e) (1) Any person who assembles, maintains, places or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years and shall be fined not more than $10,000.

(2) If any individual commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years and shall be fined not more than $20,000.

(3) for the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

Ten-year injunction as additional penalty

(f) In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the

receipt, distribution, or importation of a listed chemical may be enjoined in regulated transaction involving a listed chemical for not more than ten years.

Wrongful distribution or possession of listed chemicals

(g) (1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of record keeping or reporting requirement of section 830 of this title) shall be fined under Title 18, or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under Title 18, or imprisoned not more than one year, or both.

21 USC § 846 -- Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Fed. R. Crim. P. 30 -- Instructions

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file

written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to all parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court may instruct the jury before or after the arguments are completed or at both times. No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

Fed. R. Evid. 609 -- Impeachment by Evidence of Conviction of Crime

(a) General rule. For the purpose of attacking the credibility of a witness,

> (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
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> (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

Fed. R. Evid. 613 -- Prior Statements of Witnesses

(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness.-Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. The provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

Fed. R. Evid. 801 -- Definitions

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

Appendix B
Constitutional and Statutory Provisions

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if --

> **(1) Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or
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> **(2) Admission by party-opponent.** The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter

within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Fed. R. Evid. 804 -- Hearsay Exceptions; Declarant Unavailable

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant --

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3)

or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) Statement against interest. A statement which was at the time of its making so far

contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage, or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Other exceptions. A statement no specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as

evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Fed. R. Evid. 806 -- Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.